

1 FEDERAL TRADE COMMISSION
2 I N D E X (PUBLIC RECORD)
3
4 EXHIBITS FOR ID IN EVID
5 Commission
6 None
7 Schering
8 None
9 Upsher
10 None
11 Joint
12 Number 7 8625
13
14 OTHER EXHIBITS REFERENCED PAGE
15 Commission
16 CX 43 8626
17 CX 1791 8625
18 CX 1792 8625
19 Schering
20 None
21 Upsher
22 None
23
24 *All exhibits referenced in Joint Exhibit 7 (attached)
25 were admitted into evidence.

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Waldorf, Maryland
(301) 870-8025

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FEDERAL TRADE COMMISSION

In the Matter of:)
SCHERING-PLOUGH CORPORATION,)
a corporation,)
and)
UPSHER-SMITH LABORATORIES,) File No. D09297
a corporation,)
and)
AMERICAN HOME PRODUCTS,)
a corporation.)
-----)

Thursday, March 28, 2002

2:00 p.m.

TRIAL VOLUME 37

PART 1

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C.

Reported by: Susanne Bergling, RMR

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1 P R O C E E D I N G S

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3 JUDGE CHAPPELL: Let's reconvene docket 9297.

4 Do the parties have anything?

5 MR. CARNEY: Yes, Your Honor. We've reached a
6 stipulation regarding several outstanding exhibits
7 which we would present to the Court at this time and
8 move for the admission of those exhibits pursuant to
9 the Court's procedure through the stipulation.

10 JUDGE CHAPPELL: Go ahead.

11 MR. CARNEY: Your Honor, I've handed up what is
12 JX-7, which is a stipulation reached by the parties
13 regarding these exhibits.

14 JUDGE CHAPPELL: Okay, and this is being
15 offered by Upsher-Smith. Was it signed by
16 Schering-Plough?

17 MS. SHORES: It was, Your Honor.

18 JUDGE CHAPPELL: And complaint counsel?

19 MR. MEIER: Page 2, Your Honor, the signatures
20 for FTC and Schering-Plough are on the second page.

21 JUDGE CHAPPELL: And someone signed for
22 complaint counsel?

23 MR. MEIER: Yes, Your Honor.

24 JUDGE CHAPPELL: I'm just verifying on the
25 record.

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1 JX-7 is admitted.

2 (Joint Exhibit Number 7 was admitted into
3 evidence.)

4 MR. CARNEY: Thank you, Your Honor.

5 JUDGE CHAPPELL: Anything else?

6 MR. MEIER: Yes, Your Honor, on behalf of
7 complaint counsel, the documents that were just moved
8 in as per the JX, the joint stipulation, Number 7, I
9 have copies for the court reporter that I'd like to
10 hand up.

11 JUDGE CHAPPELL: Okay.

12 MR. MEIER: In addition to that, Your Honor, we
13 have two proffers as per the procedure earlier in this
14 proceeding. We have a proffer for the testimony of
15 Nelson Levy and a proffer for the testimony of
16 Professor Bresnahan. I'd like to hand that up to the
17 court reporter. This would be rebuttal testimony.

18 JUDGE CHAPPELL: These are offers of proof?

19 MR. MEIER: These are offers of proof, yes,
20 Your Honor.

21 JUDGE CHAPPELL: What are their exhibit
22 numbers?

23 MR. MEIER: The proffered testimony of Dr.
24 Nelson Levy is CX 1791, and the proffered testimony of
25 Professor Bresnahan is CX 1792.

1 JUDGE CHAPPELL: Okay, CX 1791 and 1792 are
2 being offered for identification only as offers of
3 proof of evidence I excluded for reasons stated in the
4 record at the time of the exclusion, okay?

5 MR. MEIER: Fine, Your Honor.

6 If I may approach the court reporter to give
7 her the -- yes.

8 MR. GIDLEY: If I may, Your Honor, I would like
9 to make a brief note for the record on the Bresnahan
10 offer of proof. It's merely a note for the record.

11 JUDGE CHAPPELL: Go ahead.

12 MR. GIDLEY: Your Honor, the proffer that we've
13 been provided from Professor Bresnahan contains
14 considerable material which was not excluded by Your
15 Honor's ruling during the Bresnahan rebuttal testimony.
16 As you will recall, Your Honor's ruling during the
17 Bresnahan exam concerned so-called substitution data
18 located CX 43 based both on the absence of rebuttal
19 report mention of this data and the witness' failure on
20 voir dire to be able to explain certain aspects of his
21 methodology. That appears at transcript 8052.

22 But the proffer contains information beyond the
23 scope of your exclusionary ruling and should have been
24 the subject of live examination and testimony by Dr.
25 Bresnahan. In particular, Your Honor, paragraphs 1

1 through 6, 23 through 25 are examples of this. Nor did
2 your ruling exclude CX 43, and paragraphs 8, 13 through
3 15 and 18 through 23 include references to CX 43.

4 Even if a reviewing authority seeks to review
5 the information contained in the proffer, it is
6 internally inconsistent, factually inconsistent with
7 the record and does not address the methodological
8 failures pointed out on voir dire.

9 Professor Bresnahan simply does not know
10 whether two or how two Klor Con 10s are substituted for
11 the K-Dur 20 would be reflected in CX 43 as he
12 testified on voir dire.

13 Thank you.

14 JUDGE CHAPPELL: So, you are stating in the
15 record your concerns regarding CX 1792. Is that
16 correct?

17 MR. GIDLEY: Correct, Your Honor, CX 1792, the
18 so-called Bresnahan proffer, and that was what my
19 previous note was referring to, Your Honor.

20 JUDGE CHAPPELL: Okay.

21 Anything further?

22 MR. GIDLEY: No, Your Honor.

23 MR. CARNEY: Nothing for Upsher, Your Honor.

24 MS. SHORES: Nothing for Schering.

25 MR. EISENSTAT: No, Your Honor.

1 JUDGE CHAPPELL: Okay, and I think you all are
2 aware of the briefing schedule which I went over last
3 week. I will be issuing an order before 5:00 today
4 confirming that and closing the record as of today.
5 So, if there is nothing further -- last chance?

6 I thank everyone for your time and patience and
7 persistence and tenacity, and we will adjourn the
8 evidentiary record; however, we will come back for
9 closing argument on the post-trial briefs on May 1st at
10 1:30, and the court reporter will be here to transcribe
11 that.

12 We're adjourned.

13 MR. NIELDS: Thank you, Your Honor.

14 MR. CARNEY: Thank you.

15 (Whereupon, at 2:10 p.m., the hearing was
16 adjourned.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9297

3 CASE TITLE: SCHERING-PLOUGH/UPSHER-SMITH

4 DATE: MARCH 28, 2002

5

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before
9 the FEDERAL TRADE COMMISSION to the best of my
10 knowledge and belief.

11

12 DATED: 3/29/02

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16 SUSANNE BERGLING, RMR

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

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24

25 DIANE QUADE

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